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IN THE

Supreme Court of the United States

No. [redacted] 298

October Term, 1970

RICHARD ALBERT,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Richard Albert, the Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the order of the Supreme Court of the Commonwealth of Pennsylvania, made and entered April 1, 1970, refusing to rehear its decision of January 30, 1970, which sustained his conviction and refused his motion for a new trial, his state remedies now have been exhausted.

Opinions Below

The opinion of the Court of Quarter Sessions of the Peace of Allegheny County, Pennsylvania, was not reported, but it is printed in the State Court Record (R. 94a). The *per curiam* opinion of the Superior Court of Pennsylvania is not reported. Although the opinion of the Supreme Court has not been reported to date, a copy thereof is attached hereto.

Jurisdiction

(i) The Order sought to be reviewed was dated and entered April 1, 1970.

(ii) No order has been sought or granted to extend the time within which to petition for Certiorari.

(iii) The statutory provisions believed to confer on this Court jurisdiction to review the judgment or decree in question are 28 U. S. C. sections 1257 and 2254.

Question Presented for Review

Was the Defendant denied a fair trial by jury when he was denied a postponment of his trial until such time as a new jury panel would be available, when some members of the existing panel had been castigated by a member of the Court for rendering a not-guilty verdict with which he disagreed.

Constitutional Provision Involved

U. S. Const. Amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

U. S. Const. Amend. XIV, "[Nor] Shall any state deprive any person of . . . liberty . . . without due process of law."

Pennsylvania Statute Involved

Act of June 24, 1939, P. L. 872, §§ 601, 602, Purdon's Pa. Stat. Ann., tit. 18 §§ 4601, 4602:

§ 4601 Lotteries.

All lotteries, whether public or private, for moneys, goods, wares, or merchandise, chattels, lands, tenements, hereditaments, or other matters or things whatsoever, are hereby declared to be common nuisances. Every grant, bargain, sale, conveyance or transfer of any goods or chattels, lands, tenements, or hereditaments, which shall be made in pursuance of any such lottery is hereby declared to be invalid and void.

Whoever, either publicly or privately, erects, sets up, opens, makes or draws any lottery, or is in any way concerned in the managing, conducting or carrying on the same, is guilty of a misdemeanor, and on conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, or undergo imprisonment, by separate or solitary confinement at labor, not exceeding one (1) year, or both. 1939, June 24, P. L. 872 § 601.

§ 4602 Traffic in Lottery Tickets.

Whoever sells, or exposes to sale, or causes to be sold or exposed to sale, or barters or exchanges or causes or offers to be bartered or exchanged, or advertises or causes to be advertised for sale, barter or exchange, or has in his possession with intent to sell or barter, any lottery or numbers ticket or share, or part thereof, or any lottery or numbers policy, or any writing, certificate, bill, token or other device purporting or intending to entitle or represent as entitling the holder or bearer, or any other person to any prize to be drawn

in any lottery, or any part of such prize or any interest therein, or in any newspaper, magazine or periodical owned or controlled by him, publishes or causes to be published, any advertisement of any lottery or numbers ticket, share, policy, writing, certificate bill, token or device, or of any lottery drawing or lottery scheme, or any prospectus, scheme, or other advertisement of any person conducting, managing or controlling any lottery, or acting as agent therefor, is guilty of a misdemeanor, and on conviction, shall be sentenced to imprisonment, by separate and solitary confinement at labor, not exceeding one (1) year or to pay a fine not exceeding five hundred dollars (500), or both.

The purchaser of such ticket, policy, or device shall not be liable to any prosecution or penalty, by virtue of this or any other law of the Commonwealth, and shall in all respects, be a competent witness to the above offense. 1939, June 24 P. L. 872 § 602; 1943, May 21 P. L. 306 § 1.

Statement of the Case

On April 19, 1966, the Petitioner, Richard Albert, was arrested and charged with operating a lottery and with traffic in lottery tickets. The defendant was indicted on May 25, 1966, and appeared for trial on July 5, 1967 before the Honorable F. Joseph Thomas and a jury. During the period of service of the jurors who were to determine the guilt or innocence of the defendant, another member of the court had severely castigated a jury for returning a verdict of not guilty with which he strenously disagreed. The Judge's castigation of the jury was given wide publicity by the news media.

Prior to beginning the trial of this case, Barney Phillips, Esquire, attorney for the defendant, appeared before the court and advised the trial judge of the events which had

transpired and requested a postponement (R. 24-25). The colloquy further revealed that other cases had been postponed for this very reason (R. 27). The court refused the request for a postponement and directed the defendant to proceed to trial. The defendant was convicted and sentenced to pay one-half the costs of prosecution, to pay a fine of five hundred dollars ($500.00) and to undergo imprisonment of not less than six (6) months or not more than twelve months in the Allegheny County workhouse.

It is respectfully submitted that the refusal of defendant's motion for a postponement subjected him to trial by a jury who were deprived of the capacity to reach a fair and impartial determination of his guilt or innocence.

Argument

The jury panel which tried the defendant, having once been castigated for returning an unpopular verdict, was deprived of the capacity to consider the evidence against the defendant fairly and impartially.

The defendant's right to a trial before a fair and impartial jury is a fundamental principle of our system of criminal justice. This right is predicated on the principle that the guilt or innocence of the defendant should be determined by a panel of dispassionate and unbiased citizens. The court has condemned the selection of jurors based on criteria which tends to exclude a segment of society or which deprives the defendant of a cross-section of moral conscience.

In the instant case, the jury which was to consider the guilt or innocence of the defendant has been subject to castigation by another member of the court. Once subject

to castigation, the jury would be naturally reluctant to be subjected to similar treatment. Thus they would be consciously or unconsciously unable to fairly and impartially deliberate.

Respectfully submitted,

JAMES A. ASHTON,
513 Second Avenue,
Pittsburgh, Pennsylvania 15219,

HENRY MUSTIN,
525 Grant Building,
Pittsburgh, Pennsylvania 15219,

Attorneys for Petitioner.

Affidavit

Commonwealth of Pennsylvania, }
County of Allegheny. } ss.:

BEFORE ME, the undersigned authority, personally appeared RICHARD ALBERT who being duly sworn according to law, deposes and says that the facts contained in the foregoing PETITION are true and correct to the best of HIS knowledge, information and belief.

RICHARD ALBERT.

Sworn to and subscribed before me
this 9th day of April, 1970.
George R. Schilter,
(SEAL) Notary Public,
Pittsburgh, Allegheny County,
My Commission Expires July 30, 1973,
Member, Pennsylvania Association of Notaries.

APPENDIX

Opinion of the Court

[J. 289]

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

v.

RICHARD ALBERT,

Appellant.

No. 220 March Term, 1969.

Appeal from the Judgment of Sentence of the Court of Quarter Sessions of Allegheny County, Pa. at No. 481 May Sessions, 1966, and Order of the Superior Court of Pennsylvania at No. 165 April Term, 1968.

Per Curiam

Filed: January 30, 1970

Judgment affirmed.

Mr. Justice O'Brien files a Concurring Opinion.

Concurring Opinion

[J. 289]

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SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

v.

RICHARD ALBERT,

Appellant.

No. 220 March Term, 1969.

Appeal from Judgment of the Court of Quarter Sessions of Allegheny County, Pa. at No. 481 May Sessions, 1966 and Order of Superior Court at No. 165 April Term, 1968.

Filed: January 30, 1970

O'BRIEN, J.

I fully concur in the result reached by the majority on the merits of this appeal but feel compelled to comment on a facet of the case which concerns me.

In the course of the pretrial, trial, post-trial and appellate proceedings in this matter, appellant has complained that during the period of the service of the jurors serving at the time of the trial, a jury had returned a not guilty verdict in a rape case. He alleges that the trial judge in that case, who was a visiting judge, castigated the jury and told them that had such a verdict been returned in his

county, the jurors would have been dismissed immediately and instructions would have been given that they were never again in their lifetimes to serve as jurors. Appellant further complained that this alleged intemperate attack by the trial judge was given wide publicity in the Pittsburgh news media. When the instant case was called for trial, counsel moved for a continuance until a new panel came on duty, in order to avoid any prejudice which might result.

In the instant case, the trial judge instructed the jury very carefully that they were to decide the case on the evidence without fear of anyone, and that it was not his function to attempt to influence the jury in any way.

I cannot see, in view of that instruction, that prejudice resulted from the alleged castigation of a jury by another judge in another case.

Moreover, the record presented to us is such that we cannot determine the nature and extent of the alleged publicity or, for that matter, whether any of the jurors allegedly castigated were members of the jury which heard the instant case. Nevertheless, I feel compelled to say that trial judges should not indulge in the practice of scolding jurors when they bring in verdicts with which the court disagrees. When jurors have once been tongue-lashed by a judge, it is possible that they will, during the remainder of their jury service, seek to avoid additional castigation by reaching verdicts they believe will be pleasing to the court. Trial judges who indulge in this practice should, in my view, discontinue it at once.